No. 84-1044

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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February 14, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Whether decisions of the California Public Utilities Commission violate the First Amendment of the U.S. Constitution by compelling an investor-owned utility to disseminate in its monthly billing envelope the communications of a third party.

Whether the California Public Utilities Commission decisions violate the Taking Clause of the Fifth Amendment of the U.S. Constitution by ordering an investor-owned utility to carry in its billing envelope the communications of a third party.

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Edison Electric Institute (EEI) supports Pacific Gas and Electric Company (Appellant) in seeking review of the final judgment of the Supreme Court of California denying a writ of review of decisions of the Public Utilities Commission of the State of California (Commission) because those decisions violate First Amendment rights by compelling Appellant to disseminate in its monthly billing envelope the communications of a third party.[1] EEI urges the United States Supreme Court (Court) to review the California Supreme Court judgment for the additional reason that the Commission decisions take the private property of Appellant in violation of its Fifth Amendment rights by compelling it to carry in its billing envelope the messages of a third party.[2]

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[1] The written consents of all parties to the filing of this brief have been filed with the Clerk of this Court.

[2] As discussed at p. 3, *infra*, the Commission's violation of the Fifth Amendment was raised by Appellant both before the Commission and the Supreme Court of California. While Appellant has not directly presented the Fifth Amendment federal question in its

PARTIES TO THIS PROCEEDING

The parties to this proceeding are set forth in the jurisdictional statement.

OPINIONS BELOW

The opinions below are reproduced in the appendix (App.) to the jurisdictional statement.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions reproduced in the jurisdictional statement, the Fifth and Fourteenth Amendments to the Constitution are involved. These additional amendments are set forth in the appendix to this brief.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve approximately 96 percent of all customers of the

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jurisdictional statement, the argument at pp. 20-22 of the statement addresses issues common to the resolution of both the First and Fifth Amendment questions, *i.e.*, whether the extra envelope space in monthly billing envelopes is utility property and whether the Commission may compel Appellant to carry in its property the messages of a third party. Because resolution of these issues under one amendment is so integrally related to resolution of the issues under the other, these are appropriate circumstances for this Court's consideration of a question not directly presented in the jurisdictional statement. *See Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see generally* R. Stern & E. Gressman, Supreme Court Practice §§ 6.27, 7.14 (5th ed. 1978). Moreover, the language in Rule 15.1(a) of this Court's rules is not a limitation on the Court's authority to decide important questions not raised by the parties. *See Blonder-Tongue Laboratories, Inc.* v. *Univ. of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971). Furthermore, the fact that an *amicus curiae* is raising the question, rather than a party, is no bar to its consideration. *See Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983); *Fry v. United States*, 421 U.S. 542, 545 n.5 (1975); *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 280 n.14 (1978).

investor-owned segment of the electric utility industry and 73 percent of the nation's electricity users.

EEI's members undertake many programs to enhance public understanding of the utility business and support increased consumer understanding of energy issues and utility rate proceedings. Furthermore, member companies are subject to comprehensive regulation pursuant to state law. But when commission regulation becomes overreaching to the point of being unconstitutional, EEI's members must object.

The constitutional questions arising in the instant case are present in actions that have been taken or considered in at least fifteen states. Because of increasing interest in obtaining access to utility mailings in recent years, EEI members have a strong interest in having this Court note probable jurisdiction.

Moreover, EEI's interest is in urging this Court to note probable jurisdiction to consider the Fifth Amendment Taking Clause issues in addition to the First Amendment issues. This consideration is especially important given the California Commission's failure to recognize the utility's property interest in the space within its billing envelope and the value of that interest.

STATEMENT OF THE CASE

EEI adopts the Statement of the Case presented in the jurisdictional statement.

THE FEDERAL QUESTIONS WERE RAISED BELOW

The jurisdictional statement shows that the First Amendment federal question was raised below before the Commission and the Supreme Court of California. Appellant also argued in its pleadings below that the Commission decisions violated the Fifth and Fourteenth Amendments of the United States Constitution. *See* Dec. No. 83-12-047, slip op. at 32-36; App. 24-27, Dec. No. 84-05-039, slip op. at 9; App. 52, and PGandE Petition for Writ of Review with Memorandum of Points and Authorities in Support Thereof, June 4, 1984 at 18-20, 23-32.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE CONSTITUTIONAL PRINCIPLES AT STAKE IN THIS CASE AFFECT THE RIGHTS OF MANY OTHER UTILITIES IN ADDITION TO APPELLANT.

The constitutional issues raised by the proceeding below will affect directly or indirectly far more than one utility in one state. In addition to the implications for the other utilities providing service in California, state legislatures and commissions in at least fourteen other jurisdictions have been and are considering proposals to create citizen utility boards (CUBs) with authority to include their messages in utility billing envelopes. The outcome of this proceeding will undoubtedly be a precedent influencing the actions ultimately taken in these states and others that may consider such proposals in the future.

Within the last several years alone, state legislatures in Wisconsin[3] and Illinois[4] have created state-wide CUBs with mandatory access to utility billing envelopes. More recently, voters in Oregon have passed a ballot initiative creating a CUB with similar access to utility billing envelopes. App. 142-50. Creation of CUBs with mandatory access to billing envelopes has been considered by voters in Missouri and state legislatures in Pennsylvania, Virginia, New York, Rhode Island, New Hampshire, Massachusetts, West Virginia and the District of Columbia.[5] Those states which have been hesitant to act because of doubts over the constitutionality of such programs will be emboldened if this Court declines to subject the California Commission's actions to

[3] Wis. Stat. Ann. § 199.10 (West 1984).

[4] Ill. Ann. Stat. ch. 111 2/3, ¶ 909 (Smith-Hurd 1984).

[5] Missouri Ballot Proposition D, 1982; H. 1368, 1983 Sess., Pennsylvania; S. 392, 1984 and 1985 Sessions, Virginia; S. 9188-B and A. 11250-A, 1982 Sess., and S. 1197-A and A. 1437-A, and S. 7467 and A. 6922, 1983 Sess., New York; No. 84-S-0370, 1984 Sess., Rhode Island; H. 842, 1983 Sess., New Hampshire; H. 5756, 1984 Sess., Massachusetts; S. 272, 1984 Sess., West Virginia; No. 5-546, 1984 Sess., District of Columbia.

the constitutional scrutiny they merit. If this Court declines to take this appeal, the constitutional controversy associated with the CUB movement will remain unresolved.

For instance, in an administrative proceeding presenting the same constitutional issues as those raised in this case, the New York Public Service Commission has issued a Statement of Policy concerning the creation of CUBs that would have access to utility billing envelopes. App. 111-41. Legislation to create a CUB having failed in 1982 and 1983,[6] the New York Commission is acting under its general regulatory authority, in much the same manner as did the Commission below. The New York Commission's actions are now being litigated in state court.[7]

The West Virginia Public Service Commission has considered a specific request of consumer groups for access to a utility's billing envelopes in that state. Although the commission there decided it lacked statutory authority to do so, its ruling is now on appeal to the state supreme court of appeals.[8] Similarly, in Montana an existing CUB petitioned the Montana Commission to gain access to utility billing envelopes. The commission in a recent order denied the petition on grounds that it lacked authority to issue such an order.[9]

Finally, the Nevada Commission initially docketed a proceeding to consider the petition of a consumer group

[6] See n.5, *supra*.

[7] *National Fuel Gas Distribution Corp.* v. *Pub. Serv. Comm'n*, Index No. 14888-84 (N.Y. Sup. Ct. filed Dec. 13, 1984), and *Consolidated Edison Co. of New York, Inc.* v. *Pub. Serv. Comm'n*, Index No. 10762-84 (N.Y. Sup. Ct. filed Aug. 31, 1984).

[8] *West Virginia Citizen Action Group* v. *Appalachian Power Co.*, 60 PUR 4th 184 (W. Va. P.S.C. 1984), *appeal docketed, West Virginia Citizen Action Group* v. *Appalachian Power Co.*, No. 16512 (W. Va. filed July 19, 1984).

[9] *In re Joint Petition of Montana Citizens Utility Board for Declaratory Ruling and Rulemaking*, Docket No. 84.10.69, Order No. 5107 (Mont. P.S.C. Dec. 24, 1984).

which sought adoption of a regulation declaring that extra envelope space is ratepayer property and inviting proposals on how and by whom that space should be utilized. That proceeding has been superseded by a proceeding in which the Nevada Commission is considering whether it has jurisdiction over extra space which might exist in utility billing envelopes.[10]

The First and Fifth Amendment principles at stake in this case are present in the actions taken or proposals considered in all these states. In addition to the clear First Amendment issues, EEI believes private property has been or would be taken without just compensation in violation of the Taking Clause of the Fifth Amendment under every one of the statutes and access proposals addressed above. In some cases, no provision has been or would be made for any kind of compensation to utilities. In other cases, although utilities have been or would be partially or totally reimbursed for the incremental costs of inserting third-party messages, the utilities have not been nor would they be compensated for the value of the property taken, under traditional Fifth Amendment analysis.

This Court five years ago had occasion to decide important constitutional issues concerning a utility's *own* use of its billing envelope. *Consolidated Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530 (1980); *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557 (1980). But the instant case is the first in which a state commission order requiring a utility to include in its billing envelopes the messages of a *third party* has been presented to this Court for review. The Commission decisions which are the subject of this appeal, decided by a bare majority of the five California Commissioners

[10] *In re Petition by the Coalition of Concerned Citizens to Adopt Rule Declaring Extra Space in Billing Envelope to Be Ratepayer's Property*, Docket No. 84-761 (Nev. P.S.C. filed July 25, 1984; withdrawn Nov. 20, 1984); *In re Investigation of Commission Jurisdiction Over Extra Space in Utility Billing Envelopes*, Docket No. 84-1129 (Nev. P.S.C. commenced Dec. 3, 1984).

over the vigorous and well-reasoned dissent of the sole lawyer on that body, present significant new constitutional issues which require resolution. Because the Commission decisions are likely to become a bellwether for action in other states, it is important for the Court to note probable jurisdiction to provide much-needed direction to legislatures and commissions across the country.

II. THE COMMISSION DECISIONS ABRIDGE THE FIRST AMENDMENT RIGHT OF FREE SPEECH.

A. The Commission Decisions Violate First Amendment Rights By Displacing Appellant's Communications And By Compelling Appellant To Disseminate The Messages Of A Third Party.

The Commission decisions compelling Appellant to allow access by a third party to its monthly billing envelopes violate Appellant's First Amendment rights[11] in two fundamental ways. In the first instance, compelling Appellant to carry in its own billing envelope the messages of another will severely impinge upon Appellant's ability to use the envelope to transmit its own views to its customers. Second, forced dissemination of third-party messages compels Appellant to be associated with messages with which it may disagree.

1. *Appellant's Right to Communicate with its Customers through its Billing Envelope Has Been Abridged.*

For sixty years Appellant has included in its billing envelope an insert carrying educational messages on energy and utility-related matters. Compelling Appellant to carry the messages of the intervenor group Toward Utility Rate Normalization (TURN) in the billing envelope will consume some and perhaps all of the space

[11] Regulated utilities, no less than corporations generally, enjoy the same First Amendment protections that are extended to all persons. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777, 784 (1978); *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980); *Consolidated Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 533, 534 n.1 (1980).

available within the envelope for Appellant to express its own views. Indeed, Appellant's communications may be entirely displaced four times a year because, under the Commission decisions, TURN's message will have priority over Appellant's insert and TURN will have the sole discretion to determine the length and weight of the messages that it will place in Appellant's billing envelope. Dec. No. 83-12-047, slip op. at 41-43; App. 32-33, *as modified by* Dec. No. 84-05-039, slip op. at 11; App. 53. The extent to which Appellant will be able to continue to communicate with its customers during these months without exceeding the one ounce postal weight increment will be left entirely to the choice of TURN. The First Amendment is plainly offended by this repression of Appellant's speech. *Consolidated Edison Co.* v. *Pub. Serv. Comm'n, supra,* 447 U.S. at 534; *Central Hudson* v. *Pub. Serv. Comm'n, supra.*

2. *Appellant's Right to Refrain from Disseminating the Views of Others Has Been Violated.*

By compelling Appellant to disseminate TURN's communications in its billing envelope, the Commission has forced Appellant to associate with and promulgate TURN's message when it would otherwise refrain from expressing such views. This requirement runs contrary to the principle that freedom of speech includes the right not to communicate or transmit someone else's messages. *West Virginia State Bd. of Education* v. *Barnette,* 319 U.S. 624 (1943); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Wooley* v. *Maynard,* 430 U.S. 705 (1977).

The latter two cases set forth the relevant constitutional principles which apply when a state seeks to compel someone to associate with the views of another.[12] At

[12] It is important to note that the Commission decisions would compel Appellant to use its own private property to transmit TURN's messages. However, use of extra space within the billing envelope has been limited exclusively to Appellant; the billing envelope has never been held open to the public. These facts render this Court's holding in *Pruneyard Shopping Center* v. *Robins,* 447 U.S. 74 (1980), inapplicable to this case. *Pruneyard* involved a right of public access to a privately-owned shopping center for purposes of speaking and petitioning which was upheld because, *inter alia,* the shopping center, by the choice of its owner, had been held open to the public. In this case no such access has been permitted.

issue in *Wooley* was a state requirement that individuals display license plates bearing the state motto, "Live Free or Die." The Court held in *Wooley* that individuals could not, under the First Amendment, be forced to carry the state's message. At the heart of that ruling was the "principle that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714. Similarly, in *Miami Herald* this Court struck down a state statute requiring newspapers to print a political candidate's reply to press criticism, holding that the constitutionally protected right to refrain from speaking must prevail over a state-created right of access. 418 U.S. at 256.

Wooley and *Miami Herald* are analogous to this case and make clear that the state violates First Amendment freedoms when it attempts to force an individual or corporation to publish or display a message containing the views of others on its private property. This is no less true where the speaker is a regulated corporation such as Appellant. *Consolidated Edison Co.* v. *Pub. Serv. Comm'n, supra.* As *Wooley* demonstrates, the state cannot compel Appellant to carry and disseminate the communications of TURN in its privately-owned billing envelope for the express purpose that the messages be read by the utility's customers. 430 U.S. at 714.

B. The Abridgment Of First Amendment Rights Cannot Be Justified Under Any Of This Court's Narrow Tests For Permissible Regulation Of Speech.

Governmental infringement of the First Amendment right of free speech has been tolerated only in exceedingly narrow circumstances. In *Consolidated Edison,* this Court delineated three doctrines that the state may invoke to justify a regulation which restricts a utility's

right to communicate its own views. Such governmental regulation may be justified only as a "permissible subject-matter regulation," a "reasonable time, place, or manner restriction," or a "narrowly tailored means of serving a compelling state interest." 447 U.S. at 535. Similarly, in *Wooley*, 430 U.S. at 716-17, the Court articulated elements which closely parallel the final test under *Consolidated Edison* as the constitutionally acceptable justification for governmental action which compels an individual to disseminate the message of another: the restriction must be based upon a compelling state interest that cannot be achieved by narrower means which are less restrictive of First Amendment rights. We demonstrate below that none of these narrow exceptions supports the state's action in this case.

1. *The Commission Decisions Repressing Appellant's Right to Communicate Are Neither Valid Subject Matter Nor Reasonable Time, Place, or Manner Regulations.*

Two of the possible justifications for repressing Appellant's right to communicate its own views may be dismissed at the outset. First, the Commission cannot justify its decisions as permissible subject matter regulation because Appellant's speech neither falls within any of the well-defined and narrowly limited classes of speech where such regulation has been allowed (*e.g.*, *Miller* v. *California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words)), nor satisfies the alternative ground that the speech being regulated occur on government-owned property. *Greer* v. *Spock*, 424 U.S. 828 (1976) (political speech at a military base); *Lehman* v. *Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city transit system vehicles).

Second, the regulation cannot be construed as a reasonable time, place, or manner restriction because the state-sponsored displacement of Appellant's communication by TURN's message is not content neutral; that is, the Commission decisions favor some viewpoints at the

expense of others. *Consolidated Edison*, 447 U.S. at 535-36; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) (unconstitutional to give special status to labor picketing); *Regan* v. *Time, Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3266-67 (1984) (federal statute allowing one type of reproduction of U.S. currency and prohibiting another based on content of message ruled unconstitutional).[13] Moreover, the repression of Appellant's right to communicate cannot be a reasonable time, place or manner restriction because the regulated speech does not involve a public forum.[14]

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[13] The Commission stated that its primary purpose was to determine "how to use the economic value of the extra space more efficiently for the ratepayers' benefit." Dec. No. 83-12-047, slip op. at 28; App. 21. *See also id.* at 6; App. 4. From the outset, the Commission's goal was to change the existing use of the billing envelope to allow a use which it considered "more efficient," and to benefit ratepayers by exposing them to a wider variety of views than they would otherwise receive from Appellant through its bill inserts. *Id.* at 23; App. 17. In *Consolidated Edison*, 447 U.S. at 537, this Court rejected the argument that a content ban on certain utility speech could be justified on the ground that it assured that "consumers will benefit from receiving 'useful' information." Similarly, in *Miami Herald*, 418 U.S. at 247-48, the Court rejected a right to reply in a newspaper grounded on the assertion of a governmental obligation to ensure that a wide variety of views reach the public. In this case the constitutional concern is that the state regulation relies upon a determination as to the value of one speaker's viewpoint versus that of another's.

The conclusion that the Commission engaged in prohibited content analysis is inescapable. Without evaluating the value of Appellant's and TURN's differing viewpoints, the Commission could not have concluded that inclusion of TURN's messages in the billing envelope four times per year would be a more beneficial use of space in the envelope than Appellant's continued use of its own billing envelope on those occasions. By favoring the inclusion of TURN's messages and displacing Appellant's, the Commission has made an impermissible judgment about the substance of Appellant's speech. To do so is to discriminate on the basis of content in violation of the First Amendment.

[14] We have not addressed whether the Commission decisions have satisfied two other criteria in the test for valid time, place, or manner restrictions of speech, *i.e.*, serving a significant governmen-

2. *The State Cannot Demonstrate that its Regulation Repressing Appellant's Right to Communicate and Requiring Appellant to Associate with Third-Party Messages Is a Narrowly Tailored Means of Serving a Compelling State Interest.*

This Court held in *Consolidated Edison*, 447 U.S. at 535, 541, that a governmental restriction of a utility's right to communicate, such as that contemplated by the Commission decisions, may be sustained only if the government can demonstrate that the restriction is a "narrowly tailored means of serving a compelling state interest." *See also Wooley* v. *Maynard, supra*, 430 U.S. at 716-17;[15] *First Nat'l Bank v. Bellotti, supra*, 435 U.S.

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tal interest and leaving open alternative channels for communication. *Regan* v. *Time, supra*, 104 S. Ct. at 3266-67. Assuming *arguendo* that those requirements were met and the restriction on Appellant's speech were deemed to be content neutral, the state's regulation would still be unconstitutional. The cases that have validated reasonable time, place, or manner regulations apply only to regulation of speech on *public* property or at a *public* forum. See, *e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (streets, alleys, and thoroughfares); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (jail). As discussed below (see III.A, *infra*), Appellant's billing envelopes are its own private property and not the property of ratepayers, the Commission, or any governmental entity. Nor has Appellant held the billing envelopes open to the public. Accordingly, the limited precedent authorizing reasonable time, place, or manner restrictions on speech occurring at public *fora* will not provide any cognizable basis for the restriction of Appellant's speech.

[15] *Wooley* articulated the additional constitutional precondition, in the context of governmental efforts to compel individuals to carry the message of a third party, that the governmental *interest* underlying the regulation be ideologically neutral. In *Wooley*, 430 U.S. at 717, the regulation failed because the state's interest was dissemination of an ideological viewpoint. Similarly, the Commission in this case fosters a particular ideology, that of TURN. Notwithstanding the Commission's official pronouncements, the Commission cannot successfully contend that its interest in allowing *TURN* to obtain greater distribution of its viewpoints is "ideologically neutral." While the Commission has stated its interests as greater consumer participation in its proceedings and enhanced knowledge of energy issues, the Commission in practice has singled out a group with a particular ideological bent and

at 786; *Elrod* v. *Burns*, 427 U.S. 347, 362-63 (1976). The Commission has met neither of these elements.

a. *The interests identified by the Commission are not compelling.*

The Commission stated the interests to be served by its decisions as "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete [consumer] understanding possible of energy-related issues." Dec. No. 83-12-047, slip. op. at 29; App. 22, *quoting* Dec. No. 83-04-020, slip op. at 17; App. 103. While these goals may be worthwhile, they fall far short of passing the compelling interest test.

The Commission's interests pale by comparison to interests determined to be non-compelling by this Court. *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (maintaining strict separation of church and state); *First Nat'l Bank* v. *Bellotti, supra* (sustaining active role of individual citizen in electoral process to maintain confidence in government and protecting shareholders whose views differ from those expressed in the political arena by corporate management). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the government sought to limit campaign expenditures by federal political candidates, including expenditures made from their own personal resources. One of the governmental interests served by the expenditure ceilings was stated as "equalizing the relative ability of individuals and groups to influence the outcome of elections. . . ." *Id.* at 48.

The governmental interest in *Buckley* is not unlike the objectives asserted by the Commission. In each instance the interest involves promoting balanced representation in a governmental process by enhancing the abilities of participants to influence the outcome. Yet in *Buckley*

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given them access to the avenue of communication provided by Appellant's billing envelopes. Even if the Commission's generally stated interests are neutral, the manner in which the interests have been pursued, by using TURN as the mouthpiece, is not ideologically neutral. Hence, the regulation cannot withstand constitutional scrutiny.

this Court found that equalizing participation in the electoral process was insufficient to justify the attendant infringement of fundamental First Amendment rights. The interest failed because "the concept that the government may restrict the speech of some elements of society in order to enhance the voice of others is wholly foreign to the First Amendment. . . ." *Id.* at 48-49. So too in this case the governmental interest in widespread distribution of information and participation in Commission proceedings may not be served at the expense of Appellant's First Amendment freedoms.

b. *The Commission decisions are not narrowly tailored because they ignore readily available alternatives.*

Even if the state's interest in repressing Appellant's own speech and directing it to distribute TURN's messages could be considered compelling, the Commission decisions must still fail. *Consolidated Edison* and *Wooley* require that the means selected to accomplish a compelling state interest be narrowly drawn. If a state has available a variety of equally effective means to the desired end, it must choose the alternative which is least restrictive of First Amendment interests. *See Shelton* v. *Tucker*, 364 U.S. 479 (1960) (state statute unconstitutional because state interest in fitness and competence of publicly employed teachers could be served by means narrower than requirement that teachers report annually all organizations with which they have been associated over five-year period).

In this case, the state has before it a panoply of available alternatives which would further the Commission's objectives without infringing Appellant's First Amendment rights. For example, representation of consumer interests in Commission proceedings could be accomplished by enhanced state funding of the Commission's staff or direct funding of TURN itself or other entities. The state legislature could create a new entity with the sole objective of expanding consumer representation in Commission proceedings.[16] Moreover, consumer messages could be disseminated in state mailings, such as those which transmit tax returns or vehicle registration forms, or in public service broadcast announcements. Similarly, the interest in developing understanding of energy-related issues could be accomplished by dissemination of information by the Commission itself or other state agencies, such as the California State Energy Resources Conservation and Development Commission. The state could employ its vast educational system as well to educate the public in this regard.

This Court has repeatedly held:

> [E]ven though the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton, 364 U.S. at 488 (footnotes omitted). The option selected in the Commission decisions is unconstitutional because it does not comply with this Court's longstanding mandate that the government adopt the least restrictive means of achieving its goal.

III. THE COMMISSION DECISIONS VIOLATE THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

The Commission decisions must also fail because they violate the Taking Clause of the Fifth Amendment of the U.S. Constitution, as made applicable to the states by the Fourteenth Amendment of the Constitution. Galloping past fundamental principles of public utility law, the

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[16] The state, for example, could authorize the attorney general to represent general ratepayer interests or create a consumer protection board, as is the case in New York (N.Y. Exec. Law §§ 63, 553 (McKinney 1982)), or establish an agency specifically to represent the interests of ratepayers at public utility commission proceedings, as is done by the District of Columbia Office of People's Counsel. D.C. Code Ann. § 43-406 *et seq.* (1981).

Commission hurdles over the Fifth Amendment implications of its actions. Rather than following precedents of this Court that require a contrary result, the Commission finds that ratepayers obtain a property interest in extra envelope space simply by paying their utility bills. In allowing a self-appointed representative of those ratepayers to use that extra space, the Commission reasons that ratepayers are using only that which is already their own. We demonstrate below, however, that the envelope and all the space within it are utility property, and that by granting a third party physical access to Appellant's private property, the Commission has taken that property in violation of the Fifth Amendment.

A. This Court's Decisions Demonstrate That Extra Envelope Space Is Utility Property, Not Ratepayer Property.

In the Commission's view the extra space in Appellant's billing envelopes is "considered as ratepayer property" (Dec. No. 83-12-047, slip op. at 5; App. 3, *quoting* Dec. No. 93887, 7 CPUC 2d 349 (1981); App. 72), even though the Commission acknowledges that the envelope itself is utility property. Dec. No. 83-12-047, slip op. at 4; App. 2-3. The Commission's strained reasoning is contrary to fundamental principles of public utility law.

In *United Rys. & Elec. Co. of Baltimore* v. *West*, 280 U.S. 234, 249 (1930) (overruled on other grounds in *Fed. Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 606-07 (1944)), the Court stated, "[T]he property of a public utility, although devoted to the public service and impressed with a public interest, is still private property. . . ." Thus, the entirety of the billing envelope—including the extra space within it—is the property of the utility. This principle is reflected in a more recent statement by this Court in *Consolidated Edison* v. *Pub. Serv. Comm'n, supra*, 447 U.S. at 540: "[Consolidated Edison] seeks merely to utilize *its own billing envelopes* to promulgate its views on controversial issues of public policy" (emphasis added).

Accordingly, when ratepayers pay their monthly utility bill they pay for service; they do not purchase the extra space in the billing envelope or any other utility property. Properties and facilities paid for by a utility with funds received for electric service are owned by the utility. This principle was articulated in *Board of Pub. Util. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23, 32 (1926):

> *Customers pay for service, not for the property used to render it.* Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* or in the funds of the company. *Property paid for out of moneys received for service belongs to the company,* just as does that purchased out of proceeds of its bonds and stock.

(Emphasis added.)[17]

If the Court does not use this case to reaffirm that principle, the rationale of the Commission decisions could be extended to the billing envelopes and property of other regulated utilities, such as gas and telephone companies. Moreover, there is no logical way to distinguish between regulated utilities and other industries for purposes of this constitutional analysis. Finally, if paying a utility bill gives a ratepayer a property interest in the extra envelope space, that same analysis logically provides the basis for claiming that ratepayers have interests in other property or facilities used to provide utility service. If customers own whatever is included in the cost of service, which provides the basis for the utility rates that customers pay, the Commission's analysis could dictate that extra office space or extra computer capacity also belongs to ratepayers.

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[17] The principle that payments for utility service do not create a ratepayer interest in property used to render the service has been followed by numerous regulatory authorities. See, *e.g.*, *Philadelphia Suburban Water Co.* v. *Pennsylvania Pub. Util. Comm'n*, 427 A.2d 1244, 1246-47 (Pa. Commw. Ct. 1981); *Duke Power Co.*, 48 FPC 1384, 1395 (1972).

B. Granting A Third Party The Right To Utilize Extra Envelope Space Constitutes An Unlawful Taking Of Private Property.

The Fifth Amendment states in relevant part: "[N]or shall private property be taken for public use, without just compensation." Dismissing the Taking Clause issues, the Commission stated:

> In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious.

Dec. No. 84-05-039, slip op. at 9; App. 52. *See also* Dec. No. 83-12-047, slip op. at 40; App. 31.

The discussion in III.A, *supra*, demonstrates that the Commission decisions affect utility property. The reasoning used to avoid a Taking Clause analysis is fallacious and disingenuous. The Commission went to such lengths to avoid finding that extra envelope space is utility property because otherwise it would have had (1) to search in vain for explicit legal authority from the state constitution or legislature to exercise the power of eminent domain over Appellant's property, (2) to make the public use finding that is a prerequisite for a constitutional taking under the Fifth Amendment, and (3) to determine the value of the property taken for which just compensation would have to be paid.

Current judicial analyses of property concepts under the Fifth Amendment have adopted a "bundle of rights" approach, which includes, *inter alia*, the rights to possess, use, and dispose of property, and the right to exclude others from using property. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 435 (1982). For the past sixty years, Appellant has utilized the space in its billing envelopes for billing materials, legal notices

and its own newsletter. It has not allowed third parties to use the extra envelope space.

In *Loretto* the Court held that the minor but permanent physical occupation of a landlord's apartment building by installation of cable television equipment, authorized by state government, constituted a taking of property for which just compensation is due under the Fifth and Fourteenth Amendments. *Loretto* stands for the proposition that when the state restricts a person's use of her own property by allowing another party to use it, there is, indeed, a physical taking of the rights to possess, use and dispose of property:

> To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. *The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.*

458 U.S. at 435 (footnote omitted and latter emphasis added).

Appellant has been stripped of its traditional power to exclude the materials of others from its envelope. Not only has the Commission unlawfully taken the power to exclude, but it has also subordinated Appellant's own message so that TURN's material permanently occupies [18]

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[18] " 'The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.' " *Loretto*, 458 U.S. at 427 n.5 *quoting* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (footnote omitted); *see also United States* v. *Causby*, 328 U.S. 256, 266-67 (1946); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 374-75, 384-85 (1946); *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S. 621, 657-59 (1981) (Brennan, J., dissenting).

Appellant's property four times per year for two years. In doing so, the Commission has violated the Fifth Amendment.[19]

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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February 14, 1985

[19] The requirement of just compensation is not satisfied, as the Commission has attempted, merely by ordering TURN to pay Appellant all the incremental costs which it incurs by inserting TURN's communications. *See* Dec. No. 83-12-047, slip op. at 31, 41; App. 23, 32. Just compensation has generally been recognized as being the value of the property taken, not merely the incremental costs of the services provided. Even the Commission recognized that there is substantial economic value to the extra envelope space by pointing to the sale of that space for commercial advertising by a utility in another state. Dec. No. 84-05-039, slip op. at 4; App. 48. The value of extra envelope space is also evidenced by the rapid growth of product advertising inserts in the monthly bills of gasoline companies, department stores and major credit card companies.

APPENDIX

ADDITIONAL CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> Section 1. Citizens of the United States
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.